

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.793 OF 1997

Shri Namdev Mhadu Patil & Anr. ...Applicants

Versus

Krishna Balu Patil & Ors. ...Respondents

.....

Mr.Rahul Walwekar i/b Mr.D.S.Sawant for Applicants.

Mrs.Babadare i/b Mr.P.R.Arjunwadkar for

Respondents 1 and 2.

.....

CORAM: A.M.KHANWILKAR, J.

MARCH 10, 2006.

P.C.

1. Heard Counsel for the parties. Perused the relevant materials on record.

2. This Revision Application takes exception to the Judgment and Order passed by the Second Additional District Judge, Kolhapur dated February 20, 1997 in Misc.Civil Application No.7 of 1996. By this order, the lower Court condoned the delay

of ten years six months and twelve days in filing the Appeal against ex-parte Judgment and Decree in R.C.S. No.116 of 1984 dated 3rd May 1985. The explanation offered by Respondents to be sufficient cause for condoning such long delay as can be discerned from the application filed before the lower Court reads thus :

"3) The appellant No.1 and 2 came in the Lower court on 3.11.84 for appearing in the matter, but on that day holiday was declared due to sad demise of the Prime Minister of India hence the appellant No.1 and 2 had not get the next date of the matter on 4.11.84 there was Sunday. Then on next date that is on 5.11.84 the appellant No.1 and 2 made inquiry to the concerning clerk about the date of the case. But the concerning Clerk told that appellant No.1 and 2 that he will intimate the next date by issuing notices to them. Therefore the appellant No.1 and 2 were not present in the lower court, as they had not received the notices in fact the matter ought to have been taken on board on next date of 2.11.84 that is on 5.11.84. But it was not done. And the Ex-parte order was passed against the appellant on 15.11.84. Therefore it is clear that injustice has been done to the appellant No.1 and 2.

4) The appellant No.1 and 2 had gone in the suit properties for agricultural work on 5.12.95 on that date the respondent No.1 and 2 forcibly came in the suit properties therefore the appellant No.1 and 2 requested the respondent No.1 and 2

not to disturb the possession but the Respondent No.1 and 2 had not listened and on the contrary told the appellants that we got the decree from the Civil Court hence we are coming in the suit properties, therefore immediately on the next date that is on 6.12.95 appellant No.1 Krishna Patil had applied for certified copies of the judgement and decree and he received the same on 11.12.95. The respondent No.1 and 2 also filed a caveat application against the appellants in the court of the Civil Judge, Jr.Dn. Kagal.

5) Appellant has fair chance to succeed in this appeal.

6) Balance of convenience lies in favour of the appellants.

7) If this application will not allowed then definitely irreparable loss will occurred to the appellants but this application will be allowed then respondents will not suffer any irreparable loss."

3. It is not in dispute that no evidence has been adduced by the Respondent to substantiate the case made out in the Application inspite of the resistance by the Applicants for condoning such a long delay which was inexorable. Interestingly, the lower Court while considering the cause made out by the Respondents for condoning the delay, has recorded the following finding:

"5..... Infact the petitioners have not examined the clerk of the Court to substantiate their contentions. Except their pleadings there is nothing to support their contentions. According to the respondents infact on the daily board prepared by the Court dt.3.11.84 the next date was given in this matter as 15.11.84. This contention is not denied by the petitioners by filing any affidavit or by producing any evidence on record. Therefore, the fact remains that the daily board for the matters fixed for appearance and hearing in the Court on 3.11.84 was prepared. The next date in this case was given on 15.11.84. Therefore, if the petitioners had exercised due diligence in getting the next date of the matter obviously they would have come to know that the next date was fixed on 15.11.84. But they have not exercised this due diligence to find out the date..... But as the first summons was duly served on the petitioners obviously there was no provision to issue a summons again even after due service of first summons. No second summons or notice was issued to the petitioner and as a result of which an exparte order was passed against the petitioners.

6. It is not disputed that rest of the respondents appeared in this case. They were native of the same village in which the petitioners are living. Therefore, it is possible that the petitioners may be knowing the date of hearing. However, the Rozanama shows that, summonses were not issued to the rest of the defendants for their appearance on 3.11.84 and, therefore, the summonses were re-issued for their appearance on the subsequent date. Thus, present petitioners and other defendants were not received summons for the appearance on the same day. Even then it was possible for the petitioners to

make an inquiry of this litigation with other respondents as they were residing in the same village. It was a question of exercising due diligence, but the petitioners have not exercised it.....".

4. Notwithstanding the above findings, the Court showed indulgence to the Respondents on specious reason that the Applicants will not suffer any prejudice for the nature of reliefs claimed in the Suit if one more opportunity was to be granted to the Respondents as is noted in Para 7 of the impugned Judgement.

5. The question that arises for my consideration is: whether the Court below could have exercised discretion after recording finding against the Respondents on the relevant issues? There is no reason to doubt the correctness of the findings so recorded. Those finding are not assailed before this Court by the Respondents. On the basis of those findings, it necessarily follows that no sufficient cause was made out by the Respondents for condoning the long delay of over ten years which as mentioned earlier, was inexonerable. Understood thus, there was no basis

before the lower Court to exercise discretion in favour of the Respondents. The reason which weighed with the lower Court in paragraph 7, in my opinion, is irrelevant to the point in issue. As no sufficient cause was made out, the Application preferred by the Respondents for condonation of delay in filing appeal ought to have been rejected. That is the course which I propose to adopt in allowing this Civil Revision Application. Ordered accordingly. No order as to costs.

A.M.KHANWILKAR, J.